v. *McDonnell,* 14 Wis. 553. Mere private instructions will not bind third parties where they have acted in good faith, relying upon the apparent general authority. They have the right to assume that the agent has authority to do whatever is right and proper in such cases. *Mallory Com. Co.* v. *Elwood,* 95 N. W. Rep. 176; *Robbins* v. *Magee,* 76 Ind. 381; *Allis* v. *Voigt,* 90 Mich. 125, 51 N. W. Rep. 190; *Harrison* v. *Kansas City,* 50 Mo. App. 332; *Russ* v. *Telfener,* 57 Fed. Rep. 973. In case the fact of agency or the extent of authority is in dispute the person relying upon it has the burden of establishing the same. *Powell* v. *Wade,* 109 Ala. 95, 19 South. Rep. 500, 55 Am. St. Rep. 915; *McAtee* v. *Perrine,* 48 Ill. App. 548; *Vawter* v. *Baker,* 23 Ind. 63; *Pratt* v. *Beaupre,* 13 Minn. 187; *Savings Society* v. *Savings Bank,* 36 Pa. St. 498, 78 Am. Dec. 390.

PUBLIC OFFICE—VACANCY IN.—Relator was elected to membership in the Board of Education but failed to qualify within the time required by law. Acting under the authority given by Sec. 5, c. 45, Code 1899 ("Vacancies in the office of school trustees, shall be filled by the Board of Education, for the unexpired term; and in the Board of Education by the county superintendent of free schools, for the unexpired term"), the superintendent of free schools for the county then appointed the relator to fill the office during the term for which he had been elected. The respondent held the office by appointment to fill a previous unexpired term and, upon demand by the relator, refused to surrender office. Respondent denied that any vacancy existed at the time of the appointment and based his denial upon the Code provision that "The term of every officer shall continue (unless the office be vacated by death, resignation, removal from office or otherwise) until his successor is elected or appointed and qualified." Sec. 2, c. 7, Code 1899. Mandamus being brought to obtain admission to the office, the court *Held,* that the occupancy of the office by the holding over of respondent did not preclude the existence of a vacancy as a basis for the exercise of the appointing power under Sec. 5, c. 45, Code 1899. *Kline* v. *McKelvey* (1905), — W. Va. —, 49 S. E. Rep. 896.

Upon practically the same state of facts the Supreme Court of Virginia reached a contrary conclusion in *Chadduck* v. *Burke* (1905), — Va. —, 49 S. E. Rep. 976. The latter decision is supported by the great weight of authority which upholds the view that so long as an office is occupied by one who has a legal right to hold it and to exercise the powers and perform the functions pertaining thereto, there is no vacancy, and that the word "vacancies" when used in such statutes has reference to vacancies caused by death, resignation, removal and the like, and does not contemplate the filling of an office for the ensuing term on the expiration of the preceding term when the incumbent holds over until his successor has qualified. MECHEM, PUBLIC OFFICERS, § 128; *Tappan* v. *Gray,* 9 Paige (N. Y.), 507; *Commonwealth* v. *Hanly,* 9 Penn. St. 513; *State* v. *Howe,* 25 Ohio St. 588; *Smoot* v. *Somerville,* 59 Md. 84; *The People* v. *Tilton,* 37 Cal. 614; *The People ex rel.* v. *Osborne,* 7 Colo. 605.

WILLS—ATTESTATION—"IN PRESENCE OF TESTATOR."—Where the weight of testimony showed a will to have been subscribed by the witnesses in a room adjoining that in which decedent lay, but the subscribing witness might pos-

sibly have been seen by decedent by changing her position; *Held,* In the absence of proof that decedent actually placed herself in position to see the witnesses sign, the will is void. *In re Beggans' Will* (1905), — N. J. —, 59 Atl. Rep. 874.

The decision is noticeable only in that it evinces a determination to follow the narrow and technical construction of that clause of the Statute of Frauds which requires wills to be subscribed by witnesses "in the presence of the testator"; which construction is supported, it must be admitted, by the overwhelming weight of authority, but which seems, in many cases, to defeat, rather than promote, the object of the statute. Thus, it is held that the tests of presence are vision and mental apprehension. JARMAN ON WILLS, *p. 87. It is not necessary, even under this rule, that the testator actually see the witnesses sign, but he must be in such position that he can, if he has his eyesight, see them sign if he so chooses. 29 AM. & ENG. ENC. OF LAW, 210; *Ambre* v. *Weishaar,* 74 Ill. 109; *Reynolds* v. *Reynolds,* 1 Spears (S. C.), 253, 40 Am. Dec. 599. The courts of three states, at least, have broken away from this construction, and have abandoned vision as an exclusive test of presence. *Sturdivant* v. *Birchett,* 10 Grat. (Va.) 67; *Riggs* v. *Riggs,* 135 Mass. 238; *Cook* v. *Winchester,* 81 Mich. 581. These cases announce the doctrine that where the testator is in hearing distance, is conscious of all that is taking place, and expressly signifies his approval, and where no fraud is practised, the subscription of the witnesses will be upheld as valid even though done outside the testator's line of vision. It would seem that the decision reached in these latter cases throws around the execution of the will all the safeguards provided by the generally accepted rule, and at the same time escapes the probability of defeating the intentions of testators by the too technical construction of a statute designed for their benefit. See an article by James Schouler, "In Presence of a Testator," 26 *American Law Review* 857.

WILLS—LOST WILL—EVIDENCE—REVIVAL OF FORMER WILL, BY DESTRUCTION OF LATER ONE.—Decedent, in 1888, made what is known as the "Rulo" will favorable to appellee. This was found by appellee, among worthless papers in an unlocked valise, after testator's death, and probate of it was upheld, although contested not only on the ground of the suspicious circumstances under which it was found but also that another will had been made. Evidence, by the attesting witnesses, that a will, called the "St. Louis" will—since lost, destroyed or suppressed,—was made in 1897, was introduced, but failed to overthrow the "Rulo" will because no revocatory clause could be proved. On petition for a new trial on the ground of newly-discovered evidence, *Held,* 1. That testimony of the attorney who drew the will as to the existence of a revocatory clause is sufficient to warrant a new trial; 2. Revocation of a will does not revive an earlier will, in the absence of evidence that such was the testator's intent. *Williams* v. *Miles* (1905), — Neb. —, 102 N. W. Rep. 482.

This interesting litigation involving property valued at more than $1,000,000 has now been before the Nebraska Supreme Court for the fourth time. 63 Neb. 859, 89 N. W. Rep. 451; 94 N. W. Rep. 705, 62 L. R. A. 383; 96 N. W. Rep. 151. The court seems clearly justified in holding that the positive testimony of the attorney who drew the "St. Louis" will that he can recall the